

Message Text

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ACTION EA-14

INFO OCT-01 ISO-00 CIAE-00 DODE-00 PM-07 H-03 INR-11 L-03

NSAE-00 NSC-07 PA-04 RSC-01 PRS-01 SP-03 SS-20

USIA-15 EB-11 DRC-01 /102 W
----- 097207

P 050620Z AUG 74

FM AMCONSUL SYDNEY

TO SECSTATE WASHDC PRIORITY 5641

INFO AMEMBASSY CANBERRA PRIORITY

AMCONSUL MELBOURNE

AMCONSUL PERTH

AMCONSUL BRISBANE

C O N F I D E N T I A L SYDNEY 1641

E.O. 11652: GDS

TAGS: PGOV, PINT, AS

SUBJ: HIGH COURT CHALLENGE TO PARLIAMENT JOINT SITTING

1. IN TWO TELECONS TODAY, SENATOR JOHN CARRICK (LIB. NSW)
AND ROBERT ELLICOTT (LIB. MP SYDNEY) SKETCHED THE PATTERN OF
THE CHALLENGE TO THE JOINT SITTING WHICH IS BEING ARGUED
TODAY.

2. ISSUES ARE (A) JURISDICTIONAL (B) SUBSTANTIVE AND
(C) TACTICAL.

A. JURISDICTIONAL. THERE ARE THREE BASIC VIEWS OF HIGH COURT'S
JURISDICTION.

1. THE PARLIAMENT IS SUPREME IN ITS LEGISLATIVE ROLE AND
THE COURT CAN NOT GO BEHIND WHAT PURPORTS TO BE A DULY
PROCLAIMED JOINT SESSION OF PARLIAMENT. THIS IS THE
GOVERNMENT'S ARGUMENT.

2. THERE IS AN EXCEPTION TO THE FOREGOINT WITH RESPECT
TO SECTION 57 WHICH PRESCRIBES THE CONDITIONS FOR A JOINT SESSION.
THIS SECTION OF CONSTITUTION, BY PRESCRIBING FOR AN EXCEPTIONAL
CASE, OVERRIDES PARLIAMENTS ORDINARY SUPREMACY AND THE COURT'S
JURISDICTION INCLUDES A JUDGMENT WHETHER ARTICLE 57 PRESCRIPTIONS
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HAVE BEEN MET. THIS IS THE PETITIONER'S (LIB SENATORS) ARGUMENT.

3. EVEN IF IT ACCEPTED THE LIBERAL VIEW ON SECTION 57, THE COUR

T
MIGHT REFUSE TO ASSUME JURISDICTION PRIOR TO THE SITTING, AND
ADVISE PETITIONERS TO RETURN TO COURT AFTERWARD IF THEY FEEL THEY HAV
E

A GRIEVANCE. BOTH CARRICK AND ELLICOTT SEEM TO FEEL THIS IS MOST
LIKELY RESULT. HOWEVER, LIBS ARE FILING SUIT PRIOR TO SITTING IN
ORDER TO ENGAGE COURT'S ATTENTION AND TO GAIN LEGAL STANDING TO
RETURN TO COURT AFTERWARD. THIS IS THE KEY POINT IN LIBERAL STRAT-
EGY TO GAIN LOCUS STANDI AND NOT BE CAUGHT "OUT OF TIME."

B. SUBSTANTIVE. ASSUMING COURT ACCEPTS JURISDICTION EITHER BEFORE
OR AFTER JOINT SITTING THERE ARE SEVERAL SUBSTANTIVE ISSUES WHICH
MIGHT BE DECIDED.

1. THAT UNDER SECTION 57 ONLY ONE BILL CAN BE PRESENTED TO
JOINT SITTING, NOT SIX. THE TEXT OF SECTION 57 DOES NOT SPECIFICALLY
LIMIT THE CASE TO ONE BILL BUT THROUGHOUT SPEAKS IN THE SINGULAR FORM

,
E.G., "JOINT SITTING SHALL VOTE UPON THE RPT THE PROPOSED LAW",
SUGGESTING FRAMERS DID NOT INTEND THIS CLAUSE TO BE USED TO RAM
A WHOLE STABLE OF LAWS THROUGH. CARRICK AND ELLICOTT BOTH SAY
THAT LAST FRIDAY CHIEF JUSTICE BARWICK APPEARED TO BE MUCH INTER-
ESTED AND EVEN FAVORABLE TO THIS ARGUMENT.

2. THAT THE PETROLEUM AND MINERAL RESOURCES BILL IN ANY
CASE HAS NO STANDING IN JOINT SITTING BECAUSE CONSTITUTIONALLY
REQUIRED LAPSE OF 3 MONTHS DID NOT OCCUR BETWEEN TWO SUCCESSIVE
REJECTIONS. THIS IS A TECHNICALITY BUT LEGALISTICALLY MIGHT BE
EASIEST TO DECIDE.

3. THAT, IF PETROLEUM BILL IS THROWN OUT, THEN THE WHOLE
PROCLAMATION OF GOV. GEN. CONVENING JOINT SITTING IS INVALIDATED
BECAUSE IT INCLUDES THIS INVALID ELEMENT. THIS MAY BE A RATHER
UNLIKELY OUTCOME AND COURT WOULD MORE LIKELY SIMPLY EXCLUDE THE
ONE BILL.

4. THAT THE BILL ACCORDING 2 SENATORS TO NORTHERN TERRITORY IS
IN-
COMPATIBLE WITH THE CONSTITUTIONAL FORM OF THE SENATE
WHICH IS A BODY OF EQUALLY REPRESENTED STATES WITH 10 SEATS
EACH.

5. THAT THE PRIMIN'S PROROGATION OF PARLIAMENT LAST APRIL IN
ORDER TO PERMIT QUEEN ELIZABETH TO CONVENE A NEW SESSION,
INTERRUPTED THE CONTINUING RYTHYM OF PARLIAMENT SO THAT NO ACTIONS
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OR PROCESSES BEGUN BEFORE PROROGATION CAN CONTINUE INTO NEW
SESSION. THIS WOULD DEFEAT THE WHOLE PROCESS AND THE JOINT SESSION
ITSELF WOULD BE INVALID. CARRICK AND ELLICOTT THINK COURT
APPROVAL OF THIS ARGUMENT UNLIKELY.

C. TACTICS.

1. ALTHOUGH HIGH COURT CONSISTS OF SEVEN JUDGES ONLY SIX ARE
PRESENT THUS OPENING POSSIBILITY OF A TIE AND FOCUSING ATTENTION
ON CHIEF JUSTICE'S CASTING VOTE. IN EFFECT BARWICK HAS TWO VOTES. IF

INITIAL VOTE IS THREE TO THREE, BARWICK GETS A SECOND VOTE TO BREAK THE TIE. THIS IS WHY CARRICK AND ELLICOTT EMPHASIZE BARWICK'S OSTENSIBLE SUPPORT FOR COURT'S JURISDICTION UNDER SECTION 57. (PARA B1.) JUSTICE MCKIERNAN IS SURE TO VOTE WITH LABOR AND LIBS NEED 2 OTHERS PLUS BARWICK TO WIN.

2. INFORMED LIBERAL OPINION IS THAT COURT WILL RESERVE RIGHT TO ASSERT JURISDICTION ON SECTION 57 BUT WILL WAIT TILL PETITIONED AGAIN AFTER JOINT SITTING TO EXERCISE IT.

3. IF COURT ULTIMATELY CONCLUDES ONLY ONE BILL MAY BE PRESENTED TO JOINT SITTING ELLICOTT ASSUMES IT WILL BE THE ELECTORAL REDISTRIBUTION BILL WHICH WAS FIRST IN CONSECUTIVE ORDER OF THE SIX CERTIFIED BY GOV. GEN. EVEN SO, L/CP WILL HAVE ANOTHER CHANCE TO DEFEAT REDISTRICTING WHEN THE REDISTRICTED MAP IS LATER SUBMITTED TO SENATE.

4. IF COURT ENTERTAINS NEW PETITION AFTER JOINT SITTING THE TWO SENATOR PETITIONERS (MCCORMACK AND WEBSTER) MAY BE JOINED BY SEVERAL STATES. THE CURRENT VIEW IS THAT ONLY SENATORS HAVE STANDING IN COURT BUT AFTER ANY OF THE SIX BILLS HAS BEEN PASSED BY JOINT SESSION, THIS PURPORTING TO BE EFFECTIVE LAW, THEN STATES WILL ACQUIRE A DIRECT CONSTITUTIONAL INTEREST AND HENCE STANDING IN COURT.

COMMENT: LIBS SEEM TO BE ADOPTING SERIOUS BUT RESERVED ATTITUDE, MAKING NO RASH CLAIMS BUT HOPING SOMEWHAT VAGUELY THEY WILL EMERGE FROM COURT CHALLENGE WITH SOME KIND OF LEGAL ADVANTAGE TO BE USED TO OFFSET WHATEVER ADVANTAGE LABOR MAY GAIN FROM JOINT SITTING.
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: LITIGATION, LAW, COURTS, CENTRAL LEGISLATURE
Control Number: n/a
Copy: SINGLE
Draft Date: 05 AUG 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: cunninfx
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974SYDNEY01641
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: GS
Errors: N/A
Film Number: D740212-0997
From: SYDNEY
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740872/aaaackjj.tel
Line Count: 142
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EA
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators:
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: n/a
Review Action: RELEASED, APPROVED
Review Authority: cunninfx
Review Comment: n/a
Review Content Flags:
Review Date: 08 JUL 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <08 JUL 2002 by shawdg>; APPROVED <24 FEB 2003 by cunninfx>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: HIGH COURT CHALLENGE TO PARLIAMENT JOINT SITTING
TAGS: PGOV, PINT, AS
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005